Appellate Review of MERC Decisions
January 1999 - December 1999
Roy L. Roulhac, Administrative Law Judge
Michigan Employment Relations Commission

Duty to Bargain - Unilateral Removal of Bargaining Unit Work - Supervisory Status

City of Detroit v *Association of City of Detroit Supervisors*, Docket No. 204946, February 9, 1999, unpublished. The employer assigned nine non-supervisory sanitation workers represented by Teamsters Local 214 to fill vacant foremen positions within the ACODS units. The sanitation workers received "out-of-class" pay and the employer continued to send their dues to Local 214.. Within 14 months the employees had been formally promoted to foremen and their dues were paid to ACODS. The Commission rejected ACODS' claim that the employer unilaterally removed bargaining unit work and assigned it to non-unit employees because the dues allegedly lost by ACODS did not constitute the kind of adverse impact contemplated in *Detroit Water & Sewerage*, 1990 MERC Lab Op 34, 40-41.

The Court affirmed the Commission's decision and rejected ACODS' attempt to factually distinguish *Detroit Water.* The Court noted that even if the MERC erred in applying the adverse impact test by examining the impact on the non-supervisory sanitation workers instead of on the ACODS unit itself, the error was harmless. The Court also concluded that the sanitation workers' temporary supervisory assignments did not violate PERA's prohibition against including supervisor and non-supervisors in the same bargaining unit. The Commission's decision is reported at 1999 MERC Lab Op 346.

Duty to Bargain - Employer Status or Identity

Grand Rapids Employees Ass'n of Public Administrators Police Officers Labor Council and *Grand Rapids Employees Independent Union v City of Grand Rapids,* 235 Mich App 398 (April 30, 1999). In a unanimous decision, the Court of Appeals affirmed MERC's dismissal of unfair labor practice charges against the City of Grand Rapids and the Grand Rapids Housing Commission. The charged alleged that the City and the Commission violated PERA by announcing that the Housing Commission was a separate employer and was, therefore, no longer bound by contracts between the unions and the City. The Court adopted MERC's reasoning that 1996 amendments to the Housing Facilities Act, MCL 125.651 *et seq.;* MSA 5.3011 *et seq*., which permitted housing commissions to employ and fix the compensation of their employees in the absence of a city resolution to the contrary, was sufficient authority for the Commission to qualify as a separate employer under PERA.

The Court rejected the Unions' assertions that the 1996 amendments were only minor, non-substantive modifications and the separation of the Housing Commission from the City retroactively impaired its employees vested rights. The Court observed that the Housing Commission was not bound by the collective bargaining agreements, was not a party to them, and did not take part in the contract's negotiations. Moreover, the Court noted that Housing Commission employees retained their contractual rights and any displaced employees would be given jobs with the City pursuant to the terms of the agreement. The Commission's decision is reported at 1997 MERC Lab Op 358.

Representation Issues - Act 312 Eligibility

Police Officers Association of Michigan v City of Southfield, Docket No. 208703, August 20, 1999, unpublished. POAM represents thirteen public safety technicians (PSTs) who provide emergency dispatch services for the Southfield police and fire departments and the Lathrup Village police department. Although the PSTs are included in the Civilian Support Services (CSS), a component of the public safety group which also includes the police and fire departments, the MERC, dismissed the union's petition for compulsory arbitration under 1969 PA 312, MCL 423.321 *et seq.;* MSA 17.455(31) *et seq.* It observed that while budgets for all public safety groups are presented together, the PSTs' budget was separately prepared, defended, and administered by its civilian director, who, like the police and fire chiefs, reports to the city administrator; only the director has authority to hire, fire, discipline, promote, or suspend PSTs; and although the parties' last contract designated police chief as a participant in the grievance procedure, he had no control over the PSTs terms and condition of employment that would likely be the subject of a grievance.

The Court affirmed MERC's findings and rejected the union's attempt to distinguish *POAM* v *Lake County,* 183 Mich App 558 (1990), in which the Court found the statutory definition of public police or fire department, which

includes emergency medical service and emergency telephone operators employed by a police or fire department, was unambiguous, and the Legislature must have intended to exclude emergency medical personnel from eligibility for compulsory arbitration when they were organized as a separate department from police and fire departments. The Commission's decision is reported at 1997 MERC Lab Op 659.

Representation Issues - Supervisory Status - Act 312 Eligibility

POAM v FOP and POAM v Montcalm County, 235 Mich App 580 (May 21, 1999). Incumbent union, FOP, appealed and the County of Montcalm cross-appealed MERC's direction of election permitting Montcalm County Sheriff Department's Act 312-eligible and non-Act 312 employees represented by the FOB in a single bargaining unit to determine whether they wished to form separate bargaining units. The Court affirmed MERC's application of its longstanding policy that Act 312 employees should be in separate bargaining units from non-Act 312 employees, although it does not require existing mixed units to be separated.

In a case of first impression, the Court concluded that MERC did not err in determining that the different remedies available to Act 312 employees outweighed considerations which favored finding a community of interest with non-Act 312 employees. Additionally, the Court upheld MERC's finding that the sergeants and lieutenants were supervisors who should be segregated from the deputies in a new unit, while allowing supervisors and subordinates to be commingled in the old unit because MERC was not called upon to determine if the latter group should be separated. Finally, the Court agreed with MERC's conclusion that the County violated its bargaining duty by refusing to bargain while this matter was pending before the Court. Section 23(f) of the Labor mediation Act, MCL 423.23(f); MSA 17.454(25)(f) explicitly states that the commencement of an appeal shall not, unless specifically ordered by the Court, operate as a stay of MERC's order.

MERC's opinions are reported at 1997 MERC Lab Op 157 and 1988 MERC Lab Op 63.

Duty to Provide Information - Internal Affairs Records - Freedom of Information and Employee Right to Know Acts

Kent County Deputy Sheriffs Ass'n v *Kent County Sheriff and Kent County,* 1999 Mich App Lexis 323 (October 26, 1999).

In an earlier MERC proceeding between the same parties, 1991 MERC Lab Op 374, the Association sought the release of internal affairs files, i.e., records and witness statements relating to the employer investigation of deputy sheriffs it disciplined for alleged misconduct. The Commission, however, found that the files were exempt from disclosure under the PERA.

Several years later, when two different deputies were disciplined for alleged misconduct, in an apparent attempt to avoid a similar result, the Association filed a lawsuit in circuit court under the Freedom of Information (FOI) and the Employee Right to Know (ERK) Acts to compel the defendant to release the deputies' internal affairs files. The County, relying on the 1991 MERC ruling, argued that the MERC had exclusive jurisdiction over the matter and if the FOIA or ERKA were to be interpreted to require disclosure, then these statutes would be in conflict with the PERA which protects internal affairs records from disclosure and takes precedence over the FOIA. Defendant also contended that the investigatory files are not subject to disclosure under either the FOIA or the ERKA. The Court of Appeals agreed and reversed the trail court which had ordered the release of the documents.

In *City of Battle Creek*, 1998 MERC Lab Op 684, which involved the POAM's attempt to obtain internal affair records, the MERC reiterated its position that copies of internal affairs records fall within a confidentiality exception to an employer's obligation to provide information that is relevant and necessary to the performance of a union's duty as a collective bargaining representative.

Procedure and Evidence - Late Filed Exceptions - Abuse of Discretion

UAW v *Frenchtown Charter Township*, Docket No. 211639, November 2, 1999, unpublished. In a 2-1 decision, the Court held that MERC did not abuse its discretion in denying the employer's motion for retroactive extension of time to file exceptions to the ALJ's decision and recommended order finding that it violated Section 10 of PERA aby discriminating against three employees in connection with a union organizing drive. The Court emphasized that the employer had been granted not one, but two extensions, and still missed the deadline. In addition, the Court noted that in its first motion for retroactive extension, the employer set forth no new ground for its failure to timely file the exception and it was not until a month and a half later that any explanation for the delay was proffered. The

Court observed that the employer's attorney claimed to represent the employer in labor law matters and must, therefore, be assumed to know that exceptions must be received by MERC by the close of business on the last day of the period granted for filing, not simply mailed on that date. The Court concluded that although there was no indication that the union would be prejudiced by the late filing, MERC's refusal to allow accept the exceptions could not be properly characterized as an abuse of discretion.

Judge Hilda Gage dissented. She favored applying the doctrine of substantial compliance, utilized by the Court exclusively in worker's compensation cases, for the view that the MERC abused its discretion by dismissing the employer's appeal for a minor procedural infraction. The Commission's decisions are reported at 1998 MERC Lab Op 106 and 1998 MERC Lab Op 271.

Unit Clarification - Substitute Bus Drivers - Community of Interest

Coldwater Community Schools v *Coldwater Educational Support Personnel Ass'n*, Docket No. 214020, November 16, 1999, Unpublished. The Court affirmed MERC's finding that the Employer's on-call, per diem substitute bus drivers were casual employees who did not share a sufficient community of interest with regularly scheduled drivers to be included in their bargaining unit. The substitutes' assignments were irregular, with no guarantee or commitment to work from one day to the next, and they were permitted, within reason, to decline assignments without penalty and hold other jobs. The Commission distinguished this case from *Southfield Public Schools,* 1984 MERC Lab Op 162, aff'd 148 Mich App 714 (1985), in which a group of substitute, on-call custodians were found to be regular employees because they were called virtually every day and had essentially committed themselves to working every day.

MERC's opinion is reported at 1998 MERC Lab Op 471.